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Submitted Oct. 23d 1874

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 399.

HENRY A. SMYTHE, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

HENRY C. FISK, THOMAS R. CLARK, AND THOMAS J. FLAGG.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 6, 1874.

Oct 13 1874

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, or some of you, between Henry A. Smythe, plaintiff in error, and Henry C. Fisk, Thomas R. Clark, and Thomas J. Flagg, defendants in error, a manifest error hath happened, to the great damage of the said Henry A. Smythe, as is said, and as appears by complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October, 1874, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this sixteenth day of October, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ of error is allowed.

SAM'L BLATCHFORD, *D. J.*

OCTOBER 16th, 1873.

UNITED STATES OF AMERICA,
Southern Dist. of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to 42, inclusive, contain a true and complete transcript of the record, and proceedings had in said court in the case of Henry A. Smythe, plaintiff in error, against Henry C. Fiske et al., defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-sixth day of March, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the said United States the ninety-eighth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

(Indorsed:) Henry A. Smythe, pl'ff in error, vs. Henry C. Fisk et al., def't in error. Writ of error. Due service of a copy of the within writ of error hereby admitted. New York. Filed Oct. 21, 1873.

1 U. S. circuit court for the southern district of New York.

HENRY G. FISKE, THOMAS R. CLARK, AND Thomas J. Flagg
vs.
HENRY A. SMYTHE.

Pleas before the judge of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the April term, A. D. 1872, to wit, of the eighth day of April, A. D, 1872.

Witness the honorable Lewis B. Woodruff, judge of the said circuit court.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

2 Be it remembered that heretofore, to wit, on the second day of December, A. D. 1867, an action was commenced in the supreme court of the city and county of New York, according to the laws of the State of New York, in favor of Henry G. Fisk, Thomas R. Clark, and Thomas J. Flagg, the plaintiffs, against Henry A. Smythe, the collector of the port of New York, the defendant, to recover moneys claimed to have been illegally exacted by said defendants as and for duties upon imports, which said action was thereafter, on the twentieth day of December, A. D. 1867, removed in due form of law, by writ of certiorari, for further prosecution and trial, into this court. by the defendant, according to the act of Congress in such cases made and provided.

And the said plaintiffs, according to law, by Benjamin L. Ludington, their attorney, complained of the defendant herein in a plea of
3 trespass on the case, for that whereas the said defendant, on the second day of December, A. D. 1867, at the city of New York, in the southern district aforesaid, was indebted to said plaintiffs in the sum of two thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant, and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of money in this court mentioned when the defendant should be thereunto afterwards requested; and
4 whereas, also, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and accruing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of two thousand dollars of lawful money as aforesaid; and, being so found in arrear and indebted to the said plaintiffs, the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested:

5 Nevertheless the said defendant (although often requested) has not yet paid the said several sums of money above-mentioned, or either of them, or any part thereof, to the said plaintiffs; but to pay the same, or any part thereof, to the said plaintiffs, the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of two thousand dollars; and thereof the plaintiffs bring suit, &c.

And the said defendant, by Samuel G. Courtney, his attorney, comes and defends the wrong and injury, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs have above thereof declared against him; and of this he puts himself upon the country, &c.

Therefore the issue above joined is ordered by the said court to be tried at a circuit court appointed to be held at the United States
6 court buildings, in the city of New York, on the first Monday of April, A. D. 1872. And now at this day, to wit, the eighth day of April, A. D. 1872, being as yet of the said April term, before the honorable Lewis B. Woodruff, circuit judge, at the said court buildings, came the said parties, by their attorneys, and the said circuit judge, before whom the said issues were tried, hath sent hither his record had before him in these words, to wit:

Afterwards, to wit, on the same day and at the same place, before the said Lewis B. Woodruff, judge of the said circuit court, come as well as the said plaintiffs and the said defendants by their respective attorneys, and the jurors of the jury also come, who to speak the truth in the matter within contained, being chosen, tried, and sworn upon their oaths, do say that the defendant did undertake and promise in manner and form as the said plaintiffs have above thereof complained against
7 him, and they assess the damages of the said plaintiffs at one hundred and thirty-eight dollars, over and above their costs and charges by them about their suit in their behalf expended, and for those costs and charges the sum of fifty-two dollars and eighty-five cents.

Therefore it is considered that the said plaintiffs do recover against the said defendant their debt, and also one hundred and thirty-eight dollars for their damages which they have sustained, as well on occasion of the detaining of the said debt as for their their costs and charges by them about their suit in this behalf expended, by the said court now here adjudged to the said plaintiffs, and with their assent, which
8 said debt, damages, costs, and charges in the whole amount to one hundred and ninety $\frac{85}{100}$ dollars, and the said defendant in mercy, &c.

Judgment signed this 24th May, 1873.

R. E. STILWELL,
Dep. Clerk.

9 (Endorsed as follows:) Vol. 7, page 4. U. S. circuit court. Henry G. Fisk et als. vs. Henry A. Smythe. Judgment roll. Filed May 24, '73.

10 U. S. circuit court, southern district of New York.

HENRY G. FISK ET AL.
ag'st
HENRY A. SMYTHE.

Afterwards, to wit, at a circuit court, held at the court-house in the
c ity of New York, for the southern district of New York, on the 8th day

of April, in the year 1872, before the honorable Lewis B. Woodruff, circuit judge, the aforesaid issue as joined between the said parties came on to be tried by a jury for that purpose duly empanelled and sworn, good and lawful men; on which day came there as well the said plaintiffs as the said defendant, by their respective attorneys aforesaid, and the jurors of the jury aforesaid impan*neiled* to try the said issue, being called,
came also and *and* were then and there in due manner chosen and
11 sworn to try the said issue.

And upon the trial of the said issue the counsel for the said plaintiffs, to prove and maintain the said issue on their part, called as a witness THOMAS R. CLARK, who being duly sworn, did depose and say:

In the year 1868, the plaintiffs herein composed the firm of Fisk, Clark and Flagg, and in that year the said plaintiffs made entry of a quantity of silk neckties at the custom-house in the city of New York.

This paper now shown me, Ex. A, is the entry in which these goods are referred to.

This paper now shown me, Ex. B, is the invoice in which these goods are referred to.

The value of the neck-ties mentioned in that invoice was about seventy-six pounds sterling.

The article now shown me I recognize a sample of these goods.
12 These goods are known and designated in commerce as neck-
ties, and only as neck-ties.

The duty charged upon them and paid was assessed upon them as silk scarfs at the rate of 60 per cent. ad valorem.

These goods are made by cutting them out of strips of black silk being cut on the bias, and they are then folded by an iron; the ends are then sown by hand to keep them from unfolding.

They are cut and made wholly by hand.

The plaintiffs paid sixty per cent. duty, according to the entry shown by Ex. A., upon the neck-ties mentioned in the invoice, Ex. B.

The plaintiffs' counsel then offered in evidence the following Exhibits:

EXHIBIT A.

Thomas Irwin & Sons, custom-house & ship brokers, 64 Wall St., New York.

Entry of merchandise imported by Fisk, Clark & Flagg, in the S. ship "City of Paris," whereof *is master, from Liverpool.—New York, Oct. 5th, 1868.*

Marks.	Nos.	Packages and contents.	Quantities.		35 p. c.	50 p. c.	60 p. c.	35 p. c. 50c. per lb.	Total.
F C. F.	1661	One case woolen shawls							
	1662	One " silk scarfs, do. paper boxes, & leather gloves			2 17 6	21 10	9 46	28 12	46
	1663	One " silk scarfs					331 9 1	91 9 3	136½
									182½
		Silk scarfs & h'dk'fs 35 to 60 p. c., $2. [Metal 35 to 50 p. c., $ 11c.]			2 17 6	21 10	425 15 1	120 1 3	570 3 10
		Discount 3 p. c.			3	12	12 15	3 12	17 2
		Charges			2 14 6	20 18	413 1	116 9 3	553 1 10
		Comm. 2½ p. c.			4	1	9	10	1 4
					1 2	10	10 6 6	2 18 3	13 15 11
		[$581 35 p. c. $203 35]			£2 16	21 9	423 15 7	119 17 9	567 18 1
		[115 50 p. c. 57 50]	Nm. H.		$14	$104	$2,051	$580	$2,749
		[2053 60 1,231 80]	[14 35	$4 90]					
		[183 50 92 50]	[104 50	52 00]					
		[$1,584 16]	[2051 60	1,230 60]					
		H. W. G.	[580 35	103 00]					
			[132 50	66 00]					
				$,556 50]					

Et. Nov. 10, '68. W.

J. G.

1,556 50 P. Oct. 5. J. H.

50 cts. STAMP. 50 cts.	50 cts. STAMP. 50 cts.

FISK, CLARK & FLAGG.

Amo' duty,	[$1,584 15]	$1,582 50	592—35	207 20
Orig'l.	1,556 20	1,556 50	104—50	52 00
			2053—60	1,231 80
Inc'r.	$27 65 H. W. G.	$25 00 H. W. G.	183 lb., 55	91 50
				$1,582 50 H. W. G.

NOTE BY PRINTER.—Figures and letters inclosed in brackets [] are erased in the original.

14 (Indorsed:) Import. Fisk, Clark & Flagg. Liquidated November 14, 1868.

EXHIBIT B.

LONDON, *Sept. 22d*, 1868.

Invoice of Merchandise forwarded to Messrs. Brown, Shipley & Co., Liverpool, to be shipped to and for account of Messrs. Fisk, Clark & Flagg, New York, per steamship.

C. ◇ F.								
	30	15 doz. ladies' woollen shawls	37	27 15			Woolen knit goods over 80c. lb. 50 & 35 p. c. 46 lbs.
		Net-weight woollens, 46 lbs., case-lined oil		17	28 12		
1661	815	5 doz. 3x4 plain twilled silk scarfs	19	4 15			Silk scarfs & h'dk'fs 60 p. c.
1662	63	3 " 5x36 Scotch tartans, silk scarfs	33	4 19			
		5 " white hemstitch'd silk cambric h'dk'fs	31	7 15			
		13 boxes for scarfs & h'k'fs		9 6			
	466	6 doz. men's gold cape gloves, Tilbury'd self	36	10 16			Leather gloves 50 p. c.
	467	8 " " Ascot tan " " "	26	10 8			
	1	12 " $\frac{5}{8}$-in. black, folded "Sublime" ties	10 6	6 6			Silk scarfs 60 p. c.
	2	36 " $\frac{3}{4}$ " " "	12 6	22 10			
	3	36 " $\frac{7}{8}$ " " "	15 6	27 18			
	4	24 " 1 " " "	16 6	19 16			
		10 gross Kingston back eyelets	4 6	2 5			Metal 50 p. c,
	238	10 doz. Cambridge cloth gloves, lined lamb	26	13			
	237	10 " mixed " " " "	25	12 10			
	244	5 " Brighton " " Tilbury'd & mitted	34	8 10			
	245	5 " Nonpareil " " Tilbury'd & B'd tan	33	8 5			Woolen knit goods over 80 c. lb., 136½ lbs., 50 & 35.
	239	10 " dark hair-line " lined lamb	26	13			
	246	10 " light " " " "	26	13			
	215	10 " Russia-fleeced "	18	9			
	247	4 5-12 doz. ladies' woolen over boots	63	13 18 3			
		Net-weight woolens, 136½ lbs., case-lined oil		1 2	210 2 9		
			9 6	32 11 11			
1663	4262	68⅝ yds. rich fig'd Ottoman silk	9 6	33 12 1			
	4266	70¾ " " " " "	9	20 14			
	4268	46 " " " " "	9 6	39 2 7			
	4228	82⅝ " rich fig'd satin	8 6	41 15 1			
	4223	98¼ " " " "	9 6	53 4			
	4227	112 " " " "	8 9	28 19			
	3664	65⅝ " rich spot twills	8 9	33 7 2			Silk scarfs 60 p. c.
	3662	76½ " " " "	10	23 13 9			
	3667	47⅝ " " King "	9	9 18			
	4261	22 " rich fig'd Ottoman	10 6	14 3 6			
	4279	27 " " " satin	42	3 6			
		1-12 doz. Lord Napier scarfs (sample)	33	2 9			
		1-12 " Prince Teck cravats		8 9	331 9 1		
		Case-lined oil			570 3 10		
					17 2		
		Dis. 3 per cent			£553 1 10		

Tho's K. Clark. Copy consul's certificate attached to original.

(Indorsed:) Oct. 5. I certify that this invoice was presented to me on entry of C. of Paris, five hundred & fifty-three, 1-10 L, custom-house, New York, this 6 day of Oct., 1868. 1662, 35, 50, 60, 35 & 50 p. c. G. W. Embree, ch. 100. Fisk, Clark & Flagg, 58 White st., cm, 2 L. Case ◇ No. 1662, as noted Oct. 17, '68, O. K., correct. T. P. L Donne. Approved. Tho's McElrath, appraiser.

17 EXHIBIT C.

OFFICE OF FISK, CLARK & FLAGG,
No. 58 White St., New York, Oct. 9th, 1868.

HENRY A. SMYTHE, Esq., *Collector:*

SIR: We do hereby protest against the payment of 60 per cent. duty charged by you on certain silk neck-ties contained in an entry made by us at the N. Y. custom-house on the 5th day of October, 1868, per the steamer City of Paris—case # 1662, C ⟨F⟩ F —.

We claim that the 60 per cent. duty charged by you is erroneous, for the reason that silk neck-ties as such are not specially provided for or enumerated in any of the tariff acts. They are, however, provided for under and by virtue of the 22d section of the tariff act of 1861, and the 13th section of the tariff act of 1862, inclusive, which section provides a duty of 35% on articles worn by men, women, or children, of whatever material composed, made up or made wholly or in part by
18 hand, not otherwise provided for.

We paid the 60 per cent. duty exacted under compulsion and in order to get possession of our goods, and shall hold you and the Government responsible for the excess demanded and received above 35%.

Very respectfully,

FISK, CLARK & FLAGG,
Per E. B. SMITH.

19 EXHIBIT D. W. B. M. H. R. S.

UNITED STATES OF AMERICA,
Treasury Department, September 18th, 1873.

Pursuant to the act of Congress of the 22d February, 1849, I hereby certify that the annexed is a true copy of the original appeal, on file in this office in this Department.

R. A. S.

In witness thereof, I have hereunto set my hand and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[L. S.] WM A. RICHARDSON,
Secretary of the Treasury.

20 OFFICE OF FISK, CLARK & FLAGG,
No. 58 White Street, New York, Oct. 5th, 1868.

Hon. H. MCCULLOCH:

SIR: We do hereby appeal to you from the payment of 60% duty charged by the collector of this port on certain silk neck-ties contained in an entry made by us at the New York custom-house on the 5th day of October, 1868, per the steamer City of Paris.

We claim that the duty on these goods should be 35 per cent. under and by virtue of the 22d section of the tariff act 1861, and the 13th section of the tariff act of 1862, inclusive.

Very respectfully,
(Signed) FISK, CLARK & FLAGG,
Per E. B. SMITH.

21 All of which were admitted in evidence.

The class of goods represented by this sample are worn by men. I have never heard them classed as ready-made clothing or in any way but as silk neck-ties.

Being cross-examined, the witness said:

Neck-ties are not always kept in ready-made clothing stores. We import them for the furnishing-goods trade, which is a distinctive business almost nowadays, and we import them for the purpose of selling them to retail houses, but not at retail. They are silk, folded in this way and ironed, turned over and pressed by hand; afterwards the ends are stitched.

Plaintiffs then called JAMES A. HARRISON, who, being duly sworn, said:

I am in the employ of John M. Davies & Co., importers and dealers in gentlemen's furnishing goods; have been in the business about 15 years. I have bought and sold and dealt in neck-ties like the one exhibited. It is known in trade and commerce as a silk tie, and never as a scarf, nor as an article of ready-made clothing. A scarf is an entirely different article.

Being cross-examined, the witness said:

Our house is in the furnishing-goods business; that includes everything in the way of under-clothing, under-shirts, drawers, half-hose, gloves, and suspenders. We import drawers; they are not clothing. We make shirts and import under-shirts. I don't consider them clothing. We keep silk neck-ties and scarfs. Silk scarfs are made of silk in a variety of shapes and styles, designed exclusively for wear around the neck. The scarfs that are imported are men's furnishing goods. Ties and
23 scarfs are about all that are imported for wear about the neck.

A tie is an article that the wearer ties himself about his neck, and a scarf is generally slipped on without tying. We have another article that fits with a spring, called stocks, made here; they were formerly imported, but now very few are sold.

We import and deal in knit jackets used for wear between the coat and vest, called cardigan jackets. I do not call them clothing. We have nothing to do in our business with clothing. We import all kinds of stockings worn by men. I should not think a man would be very well clothed without the articles we deal in.

On his redirect examination, the witness said:

On an order for a line of scarfs, I would not include neck-ties.
24 I should tell a man who inquired for ready-made clothing at my store that I did not keep it.

Neck-ties are not known as ready-made clothing in commerce.

Being recross-examined, the witness said:

If such a buyer should come to my store, I would try and sell him some furnishing goods, but we would not sell them to him as ready-made clothing.

The plaintiffs then called as a witness JAMES A. CONNOR, who, being sworn, said:

I have charge of a department in the wholesale house of A. T. Stewart & Co., known as the lace department. In that we keep laces, ties, cravats, bows, and that class of goods generally. Ready-made clothing is not kept in that house. We deal in the article now exhibited to
25 me. It is known and designated in the trade as a black tie. We also deal in scarfs. I should not call this article a scarf. A scarf differs decidedly from the samples shown me. On an inquiry by a customer for scarfs, I would not show him these ties, and if he asked for ready-made clothing, we should tell him we didn't have it.

Being cross-examined, the witness said:

I keep varieties of silk scarfs in my department. They are made exclusively for wear on the neck. I also keep what are known as bows; they are designed exclusively to be worn on the neck.

There are several shapes of scarfs; they are generally designed to come down and cover the bosom. I also deal in cravats, which are a square piece of silk, designed for wear on the neck, and generally folded by the wearer. Scarfs and ties generally come folded, but scarfs
26 sometimes come unfolded, and also cravats sometimes come ready folded.

On his redirect examination the witness said:

I know of no other use of these articles but for wear around the neck.

The plaintiffs then called as a witness DAVID H. ACKERMAN, who, being duly sworn, said:

I am in the employ of A. T. Stewart & Co., in what is known as the lace department. I deal there in laces, embroideries, handkerchiefs, and gentlemen's furnishing goods. The article now shown me is known in trade as a black tie.

Have been 4½ years in the business. If ready-made clothing were asked for in our department I would say that we do not keep it. If I was asked for scarfs I would not show the article I have called a black tie.

27 Being cross-examined the witness said:

I am with the previous witness in business, and, having heard his examination, I agree with him in what he said about scarfs and cravats.

Neck-ties, scarfs, cravats, are all designed exclusively for wear on the neck, and generally made of silk. There are a great variety of scarfs, differing in form. They are cut out of silk and made up. The article shown by plaintiffs gets its name from being made in the particular shape you see it and from tying. A great many scarfs also tie. The article I have on is a Windsor cravat, tied and folded by myself.

The difference between this and the article shown by the plaintiffs is in the stitching.

Regular scarfs come folded and stitched ready-made; some have
28 a fixed width, others you can vary the width by folding, as in the cravat I have on.

Ties come of various widths, from half an inch to two inches.

THOMAS CLARK, being recalled, said:

I have computed the difference between 35 and 60 per cent. duty on this *this* importation. The difference with interest to the present time is $138.

The plaintiffs here rested their case, and the defendant's counsel then and there asked the court to instruct the jury to render a verdict for the defendant on the following grounds:

1st. That it appeared from the evidence that the article of silk neck-ties being nowhere specifically mentioned as such in the tariff acts, bore a similitude to, was of similar texture, was designed for the same uses,

and was made of the same materials as silk scarfs, and therefore should pay the same duty as scarfs.

2d. That it appeared from the evidence that the article of silk
29 neck-ties was composed of silk, or that the component or chief value therein was silk, and that therefore they were subject to a duty of sixty per cent.

3d. That as it appeared from the evidence that the said silk neck-ties were designed exclusively for wear about the neck, that therefore they were to be considered and taken as ready-made clothing, and were subject to duty as such.

And the court, then and there, to each of such requests so to direct a verdict for the defendant, refused so to direct a verdict; and to each of such refusals so to direct a verdict the defendant's counsel then and there duly excepted.

The counsel for the defendant then asked the court to charge the jury that the articles exhibited by the plaintiffs not being specifically named in the tariff laws, if the jury should find that they bore a simili-
30 tude, either in material, quality, texture, or use, to silk scarfs, the jury should find a verdict for the defendant.

And the court then and there refused so to charge; to which ruling the defendant duly excepted.

The defendant's counsel then asked the court to charge that if the jury should find that the articles exhibited by the plaintiffs were composed of silk, or that the component of chief value therein was silk, that in such case the defendant was entitled to a verdict.

And the court then and there refused so to charge; to which ruling the defendant then and there duly excepted.

The defendant's counsel further requested the court to charge the jury that the articles exhibited by the plaintiffs, being designed for wear about the neck, were ready-made clothing, and should pay duty
31 as such, and that therefore the defendant was entitled to a verdict.

And the court then and there refused so to charge, to which ruling the defendant duly excepted.

And the court then and there charged the jury:

GENTLEMEN OF THE JURY: I appreciate, and perhaps yourselves may, the difficulty of comparing, in the progress of a trial, the various statutes of the United States that bear upon a question of this sort. There is satisfaction, however, in knowing that if the impressions which here obtain shall be erroneous, they are subject to review and more deliberate consideration in this court and elsewhere, if the parties desire. The impression on my mind, on hearing counsel and giving such consideration as the opportunity now presents, is, that when Congress pro-
vided in respect to articles non-enumerated, but yet similar to
32 those which are enumerated, they did not mean simply and only to provide for articles that are specified by name, but they meant to provide for articles that did not come within a specific designation found in existing laws. They foresaw, or perhaps had learned, that with the utmost care and painstaking of the legislature to provide for duties upon goods in various classes, in such classification as they deemed the interest of the country required, there would nevertheless appear occasionally goods which could not be assigned a place in the law by any designation which had been employed. I think this act of

1842 meant to provide for that class of cases in which goods were imported, in respect to which in no terms of enumeration could there be found a clause in the statute that was apt to describe them, that any such goods should be classed with those to which they bore similitude in
33 kind, quality, and use, and that therefore, when Congress adopted designation, distinct and explicit, which embraced a particular article, then this section in the act of 1842 had no application to it, so that I am not able on the brief reflection I have been able to give the subject, and the short examination of the law which is permitted me, to adopt the views of the counsel for the Government in this case. I, therefore, dispose of the case upon my view of the construction of the act under which the duty was imposed. That provides that, on and after the day and year aforesaid, in lieu of duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected, and paid on the goods, wares and merchandise enumerated and provided for in this section, imported from foreign countries, the following duties and rates of duties; that is to say, among other things, upon silk
34 vestings, pongees, shawls, scarfs, handkerchiefs, and various other things. Now, if, upon the evidence, silk ties are not included in that enumeration of shawls, scarfs, mantillas, handkerchiefs, veils, and laces, then ties are not among the articles in that part of the section mentioned, and I do not understand the counsel for the Government to insist that they are. Then follows: "On all manufactures of which silk is the component material of chief value, not otherwise provided for, 50 per cent." Now, had this been a statute which purported to cover the whole subject—if it purported to be an entire revision of the whole law relating to duties on imports, and had, either by express words or by implication, repealed previously-existing laws, there would have been no room to doubt that "not otherwise provided for" meant not otherwise provided for in this act. Counsel for the Government insists that the intention to give those words that construction is apparent on
35 reading the entire section. I am not satisfied that that is so. The act is specific. In most or all of its provisions it appears to have been a taking up of the tariff laws, and on a review of them, a selecting in various classes the articles which are here enumerated or embraced, and anew defining the duties upon them, and the language "any manufacture of silk, or of which silk is a component material of chief value, not otherwise provided for," in my judgment means not otherwise provided for in this or any other act.

Entertaining that view of the construction of the statute, if these goods are not ready-made clothing, (which is an expression also found in this act, and that is not strenuously insisted upon,) and if they are not scarfs, then, for the purpose of this trial, I must say that the plaintiff is entitled to recover the amount which he claims. I shall
36 give the counsel an opportunity to discuss this subject further, if it is deemed desirable, under circumstances in which I can take up the various statutes and compare them with much more care, and with a better opportunity to criticise them, than I can have in the progress of this trial. For the present what I have to say to you is, that if you shall find upon the evidence that the goods in question are not ready-made clothing, and are not scarfs, the plaintiff is entitled to a verdict.

To which charge defendant's counsel duly excepted.

The defendant's counsel further specially excepted to so much of the said charge as charged the jury that it was a question for them to determine whether or not the articles exhibited by the plaintiffs were or

were not ready-made clothing or scarfs, and that if the jury should find them not to be ready-made clothing, and not to be scarfs, in such
37 case their verdict should be for the plaintiffs.

Defendant's counsel also particularly excepted to so much of the said charge wherein the jury were substantially charged that the question of whether or not the articles exhibited by the plaintiffs did or did not bear a similitude in quality, material, texture, or use to silk scarfs was not to be considered in determining the case.

And inasmuch as the said several matters and the said exceptions do not appear by the record of the verdict aforesaid, the said Lewis B. Woodruff, circuit judge, at the request of the counsel for the said defendant, (and on the express written stipulation of the counsel for the plaintiff, written thereon, that it is correct,) has put his seal to this bill of exceptions this 24th day of May, 1873.

L. B. WOODRUFF. [L. S.]

38 (Endorsed as follows:) United States circuit court. Henry G. Fisk & al. v. Henry A. Smythe. Defendant's proposed case & exceptions. Noah Davis, def't's att'y.

Service of copy of within admitted.

B. L. LUDINGTON, *Att'y.*
E. HARTLEY, *Counsel.*

Filed Oct. 21, 1873.

It is admitted that this is the correct bill of exceptions in the within entitled cause, and we consent that the same may be signed and sealed by the court, waiving all exceptions heretofore made by plaintiff.

Mar. 22, '73.

E. HARTLEY,
Counsel for Pl'ff.
GEO. BLISS, JR.,
Def't's Atty.

39 Supreme Court of the United States.

HENRY A. SMYTHE, PLAINTIFF IN ERROR, *vs.* HENRY G. FISK ET AL., DEFENDANT IN ERROR. } In error. October term, 1874.

Afterwards, to wit, on the first Monday of October, in this same term, before the justices of the said court at the Capitol, in Washington, came the said plaintiffs in error, by George Bliss, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the records as aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants in error, Henry G. Fiske and others, against the said plaintiff in error, Henry A. Smythe, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant. And the said plaintiff prays that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings
40 aforesaid, may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to move things which he has lost by reason of the said judgment.

GEORGE BLISS,
Att'y for Pl'ff in Error.

(Endorsed:) U. S. Supreme Court. Henry A. Smythe, plaintiff in error, versus Henry G. Fiske et al., defendant in error. Assignment of error. Filed March 26, '74.

NEW YORK, *Mar.* 26, 1874.

Due service of the copy of the within admitted this 26 day of March, 1874.

(Signed) E. HARTLEY,
Attorney for Def't in Error.

41 By the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To Henry C. Fisk, Thomas R. Clark, and Thomas J. Flagg, defendants in error:

Whereas, Henry A. Smythe, plaintiff in error, has brought and presented a writ of error lately issued out of the Supreme Court of the United States, and said writ of error directed to the judges of the circuit court of the United States for the southern district of New York, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said circuit court before the judges thereof, between the said Henry A. Smythe, plaintiff in error, and Henry C. Fisk, Thomas R. Clark, and Thomas J. Flagg, defendants in error, a manifest error hath happened, to the great damage of the said Henry A. Smythe; and whereas for the correction of that error in due manner the said writ has been issued returnable at the next stated term of the Supreme
42 Court of the United States, at the city of Washington, on the second Monday of October, 1874.

You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October, 1874, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the sixteenth day of October, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

SAM'L BLATCHFORD.

(Indorsed:) U. S. circuit court, so. district of N. Y. Henry A. Smythe, pl'ff in error, vs. Henry C. Fisk et al., def'ts in error. Citation on appeal. George Bliss, att'y for app'lt. Filed Oct. 21, 1873.

Due service of a copy of within citation is hereby admitted.

B. L. LUDINGTON,
Att'y for Def'ts in Error.

(Indorsement on cover:) No. 399. Henry A. Smythe, collector of the port of New York, plaintiff in error, vs. Henry C. Fisk, Thomas R. Clark & Thomas J. Flagg. New York C. C. U. S. Filed 6th April, 1874.

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In the Supreme Court of the United States.

OCTOBER TERM, 1874.

H. A. SMYTHE, *Collector, &c., Plaintiff in Error,*
vs.
H. C. FISKE, *et als.*
No. 399.

In Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE UNITED STATES.

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No. 399.

In Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE UNITED STATES.

This is an action of assumpsit commenced on the 2d of December, 1867, in the supreme court of the city and county of New York, by the present defendants, against the plaintiff in error, to recover moneys claimed to have been illegally exacted by said plaintiff as and for duties upon imports; which action was afterwards removed into the circuit court of the United States for the southern district of New York, and there tried by a jury at the April term, 1872.

The plaintiffs below declared in three counts: (1) for money lent; (2) for money had and received; and (3) upon an account stated. The defendant pleaded the general issue.

The things in respect to which such duties were exacted were *silk neckties* imported in October, 1868.

Upon these the collector had exacted a duty of sixty per cent., against the payment of which the present defendants *protested*, for the reason that silk neckties, as such, are not specially provided for or enumerated in any of the tariff acts, but are provided for in the 22d section of the tariff act of 1861, and the 13th section of that of 1862, which provide a duty of thirty-five per cent. on "articles worn by men, women, or children, of whatever material composed, made up, or made wholly or in part by hand, not otherwise provided for."

It was shown in evidence (Record, p. 8) that the neckties in question were made of silk, folded and ironed, turned over and pressed by hand, the ends being afterwards stitched; that they were known in trade and commerce as a silk tie, and never as a scarf, or an article of ready-made clothing.

Upon the trial the plaintiff in error asked the court to instruct the jury to render a verdict for him upon the following grounds:

"1st. That it appeared from the evidence that the article of silk neckties, being nowhere specifically mentioned as such in the tariff acts, bore a similitude to, was of similar texture, was designed for the same uses, and was made of the same materials as silk scarfs, and therefore should pay the same duty as scarfs.

"2d. That it appeared from the evidence that the article of silk neckties was composed of silk, or that the component or chief value therein was silk, and that therefore they were subject to a duty of sixty per cent.

"3d. That, as it appeared from the evidence that the said silk neckties were designed exclusively for wear about the neck, that therefore they were to be considered and taken as ready-made clothing, and were subject to duty as such."

And the court, then and there, to each of such requests, so to direct a verdict for the defendant, refused so to direct a verdict; and to each of such refusals so to direct a verdict, the defendant's counsel then and there duly excepted.

The counsel for the defendant then asked the court to charge the jury that the articles exhibited by the plaintiffs not being specifically named in the tariff laws, if the jury should find that they bore a similitude, either in material, quality, texture, or use, to silk scarfs, the jury should find a verdict for the defendant.

And the court then and there refused so to charge; to which ruling the defendant duly excepted.

The defendant's counsel then asked the court to charge that if the jury should find that the articles exhibited by the plaintiffs were composed of silk, or that the component of chief value therein was silk, that in such case the defendant was entitled to a verdict.

And the court then and there refused so to charge; to which ruling the defendant then and there duly excepted.

The defendant's counsel further requested the court to charge the jury that the articles exhibited by the plaintiffs, being designed for wear about the neck, were ready-made clothing, and should pay duty as such, and that therefore the defendant was entitled to a verdict.

And the court then and there refused so to charge; to which ruling the defendant duly excepted.

And the court then and there charged the jury:

"GENTLEMEN OF THE JURY: I appreciate, and perhaps yourselves may, the difficulty of comparing, in the progress of a trial, the various statutes of the United States that bear upon a question of this sort. There is satisfaction, however, in knowing that if the impressions which here obtain shall be erroneous, they are subject to review and more deliberate consideration in this court and elsewhere, if the parties desire. The impression on my mind, on hearing counsel and giving such consideration as the opportunity now presents, is, that when Congress provided in respect to articles non-enumerated, but yet similar to those which are enumerated, they did not mean simply and only to provide for articles that are not specified by name, but they meant to provide for articles that did not come within a specific designation found in existing laws. They foresaw, or perhaps had learned, that with the utmost care and painstaking of the legislature to provide for duties upon goods in various classes, in such classification as they deemed the interest of the country required, there would, nevertheless, appear occasionally goods which could not be assigned a place in the law by any designation which had been employed. I think this act of 1842 meant to provide for that class of cases in which goods were imported, in respect to which, in no terms of enumeration, could there be found a clause in the statute that was apt to describe them, that any such goods should be classed with those to which they bore similitude in kind, quality, and use, and that therefore, when Congress adopted designation, distinct and explicit, which embraced a particular article, then this section in the act of 1842 had no application to it, so that I am not able, on the brief reflection I have been able to give the subject, and the short examination of the law which is permitted me, to adopt the views of the counsel for the Government in this case.

"I therefore dispose of the case upon my view of the construction of the act under which the duty was

imposed. That provides that, on and after the day and year aforesaid, in lieu of duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected, and paid on the goods, wares, and merchandise enumerated and provided for in this section, imported from foreign countries, the following duties and rates of duties; that is to say, among other things, upon silk vestings, pongees, shawls, scarfs, handkerchiefs, and various other things. Now, if, upon the evidence, silk ties are not included in that enumeration of shawls, scarfs, mantillas, handkerchiefs, veils, and laces, then ties are not among the articles in that part of the section mentioned, and I do not understand the counsel for the Government to insist that they are. Then follows: 'On all manufactures of which silk is the component material of chief value, not otherwise provided for, 50 per cent.' Now, had this been a statute which purported to cover the whole subject—if it purported to be an entire revision of the whole law relating to duties on imports, and had, either by express words, or by implication, repealed previously-existing laws, there would have been no room to doubt that 'not otherwise provided for' meant not otherwise provided for in this act. Counsel for the Government insists that the intention to give those words that construction is apparent on reading the entire section. I am not satisfied that that is so. The act is specific. In most or all of its provisions it appears to have been a taking up of the tariff laws, and, on a review of them, a selecting in various classes the articles which are here enumerated or embraced, and anew defining the duties upon them; and the language, 'Any manufacture of silk, or of which silk is a component material of chief value, not otherwise provided for,' in my judgment means not otherwise provided for in this or any other act.

"Entertaining that view of the construction of the statute, if these goods are not ready-made clothing, (which is an expression also found in this act, and that is not strenuously insisted upon,) and if they are not scarfs, then, for the purpose of this trial, I must

say that the plaintiff is entitled to recover the amount which he claims. I shall give the counsel an opportunity to discuss this subject further, if it is deemed desirable, under circumstances in which I can take up the various statutes and compare them with much more care, and with a better opportunity to criticise them, than I can have in the progress of this trial. For the present, what I have to say to you is, that if you shall find, upon the evidence, that the goods in question are not ready-made clothing, and are not scarfs, the plaintiff is entitled to a verdict."

To which charge defendant's counsel duly excepted.

The defendant's counsel further specially excepted to so much of the said charge as charged the jury that it was a question for them to determine whether or not the articles exhibited by the plaintiffs were or were not ready-made clothing or scarfs, and that if the jury should find them not to be ready-made clothing, and not to be scarfs, in such case their verdict should be for the plaintiffs.

Defendant's counsel also particularly excepted to so much of the said charge wherein the jury were substantially charged that the question of whether or not the articles exhibited by the plaintiffs did or did not bear a similitude in quality, material, texture, or use to silk scarfs, was not to be considered in determining the case.

We assign for error the refusal of the court to charge the jury that the articles exhibited by the plaintiffs not being specifically named in the tariff laws, if the jury should find that they bore a similitude either in

material, quality, texture, or use, to silk scarfs, the jury should find a verdict for the defendant."

Also, his instruction to the jury, that "if you shall find, upon the evidence, that the goods in question are not ready-made clothing, and are not scarfs, the plaintiff is entitled to a verdict."

The claim of the plaintiffs below was that the duty upon neckties was provided for by the 22d section of the act of 1861, and the 13th section of the act of 1862, the joint effect of which is to impose a duty of thirty-five per cent. upon all "articles worn by men, women, and children, of whatever material composed, made up, or made wholly or in part by hand, *not otherwise provided for*."—(12 Stat., 196, 556.)

This claim depends, of course, upon the non-existence in any other part of the revenue acts in force at the time of importation, of a provision applicable to silk *neckties;* for if, at that time, such provision did exist, the neckties were *otherwise provided for* than by the above sections.

In making this inquiry, the existence of the above sections may be laid out of view, as their operation is merely *residuary*. As in wills, so here, the meaning of the other parts of the instrument is to be ascertained before the extent of a *residue* can be determined.

In this connection we are disposed to admit that the word *silk*, when used in the act as a substantive, unless where qualified by its context, refers to raw silk, (see also in the same connection *cotton and flax*,) and therefore that the phrase "manufactures of silk" refers in such act presumptively to silk thread or silk goods, and therefore that the sections in which it

occurs cannot be cited as *otherwise providing* for articles of silk "*made up*," &c., so as to affect the extent of the above residuary provision. We, therefore, shall not contend that neckties are included in the provision "On all manufactures of which silk is the component material of chief value, not otherwise provided for, 50 per cent."

In view of the evidence on the subject, we suppose that we are concluded from contending that the necktie is an article of *ready-made clothing*.—Law *vs.* Cross, 1 Bl., 533; U. S. *vs.* Jackalow, *ibid*, 484; Bischoff *vs.* Wetheree, 9 Wall., 812.

I. By the 8th section of the act of 1864, chap. 171, a duty of 60 per cent. ad valorem is laid upon a part of the goods therein "*enumerated* and provided for," viz: "On silk vestings, pongees, shawls, scarfs, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, caps, turbins, chemisettes, hose, mits, aprons, stockings, gloves, suspenders, watch-chains, webbing, braids, fringes, galloons, tassels, cords, and trimmings."

The use of the word *enumerated* in that section is significant, reminding one as it does of the provision in the act of 1842, chap. 270, sec. 20: "That there shall be levied on each and every non-enumerated article which bears a similitude either in material, quality, texture, or the use to which it may be applied to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the par-

ticulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied, collected, and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts are chargeable."

The court below was of opinion that the word "enumerated," in the act of 1842, applies to the mention of articles *by specific designation*, (*i. e.*, as we understand it, *by classes*,) as well as to their mention *by name*. We admit that *enumeration* may be *by classes* as well as by articles; but observe, as material in this connection, that the enumeration above referred to is, upon its face, *of the latter kind only*, and therefore that it is not admissible to regard the above provision of the acts of 1861 and 1862 as *an enumeration of the articles* described therein, within the meaning of the above section of the act of 1842; for, although *the class* to which these articles belong may be said to be one *enumerated* in the sections of the acts of 1861 and 1862, along with other *classes*, and also some *articles*, yet *the articles* of which it is composed are not *enumerated;* and the act of 1842 refers to enumerated *articles*. Upon the contrary, the clause in the 8th section of the act of 1864 is an enumeration of some thirty *articles*, *all* of the same material of which these neckties are composed, *many of them* articles worn by men, as they are, and *some of them*,

also, articles "made up," as they are, or even "*made* wholly or in part by hand," as they are.

We therefore submit that the importation of silk neckties in question is governed by the provisions of the acts of 1864 and 1842, above quoted. The point appears to us to be very clear, and to admit of but little elaboration, so that we confidently leave it in its above brief statement.

II. Other considerations may be mentioned which tend to strengthen this conclusion.

The provision relied upon by the plaintiff below made its appearance first in the tariff act of 1846, and, at that time, wanted the expression "not otherwise provided for."—(9 Stat., 44.)

The addition of that phrase first by the act of 1861, (above,) was a significant hint that some of the articles, formerly therein included, were to be so no longer. The original provision must have grouped together, under one duty, a great many incongruous articles; and it is in accordance with the usual results of progress and intelligence that later legislation on a subject so full of discriminations as a tariff, should have taken from such a huddle many articles which a better-informed policy required to be distinguished therefrom.

In statutes demanding attention to a great many particulars, like tariff acts, apparently there is more intelligence displayed in those parts which found their distinction upon an enumeration of particulars than in those which distinguish by classes, whilst, perhaps, the least intelligent parts are those which sweep things into *a residue*—generally having no more than a very

obscure reference to principle, and frequently resorted to as the only refuge from still worse effects of an excusable ignorance or inadvertence of the legislators. It seems to us that a clause which places under the same duty the vast variety of *articles worn by men, women, or children, made up or made wholly or in part by hand*, is a striking illustration of the straits to which unavoidable ignorance may sometimes reduce legislators. For this reason it is that such acts often provide that clauses affecting *classes* shall have no operation as against other more detailed provisions upon the same subject, or upon parts thereof. The less intelligent clause is thereby made to yield to that which is more intelligent. In this connection we submit that next to the precision marking legislation proceeding by an enumeration of articles, is that of legislation referring to such provision non-enumerated articles similar in material, use, &c.; or, at all events, whatever doubt may be cast upon the assertion that this is in the *very next* degree of precision, such legislation, *by reference*, is very far superior in point of intelligence to provisions like that first above quoted and relied upon by the plaintiffs below; and therefore, that the *deference* exhibited in its final clause to all other provisions on the same subject, is in reason applicable to provisions for articles *not enumerated*. In other words, it seems that the minds of the legislature, when determining the duty upon silk scarfs, handkerchiefs, veils, shirts, hose, suspenders, and the other above-enumerated silk articles of men's, women's, and children's wear, *made up*, &c., were more advertent to the considerations which would have determined

the duty upon *silk neckties*, had that name then occurred to the draughtsmen, than they were when sweeping together, in a *residuary clause*, articles of such wear, *of whatever material composed, made up, &c.*

G. H. WILLIAMS,
Attorney General.

S. F. PHILLIPS,
Solicitor General.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1874.

HENRY A. SMYTHE, COLLECTOR, &c.,
Plaintiff in Error,

vs.

HENRY C. FISKE ET ALS.,
Defendants in Error.

No. 399.

In Error to the Circuit Court of the United States for the Southern District of New York.

Brief for Defendants in Error.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1874.

Henry A. Smythe, Collector, &c., Plaintiff in Error, vs. Henry C. Fiske et als., Defendants in Error.	No. 399.

In Error to the Circuit Court of the United States for the Southern District of New York.

Brief for Defendants in Error.

The evidence shows that the neckties imported are known in trade and commerce as "ties;" that they are not scarfs, nor so known among merchants; that ties and scarfs resemble each other as hats and caps do,

but are just as distinct articles in trade, and that on an order for neckties scarfs would not be furnished or shown to customers; that they are made in different ways and styles; also that neckties are not ready-made clothing, nor so known in trade and commerce.

See Record, page 4, folio 10; page 7, folio 21 and all pages 8 and 9.

On this uncontradicted evidence under the charge of the court, "that if these neckties are not ready-made clothing and are not scarfs, plaintiffs are entitled to a verdict," the jury found for the importers, settling the only questions of fact that the goods were not scarfs and not ready-made clothing.

Record, page 11, folio 36.

The verdict of a jury upon a pure question of fact is conclusive.

ARGUMENT.

Two grounds of error only are assigned—

First.—The refusal to charge "that the articles ex-"hibited by the plaintiffs not being specifically named "in the tariff laws, if the jury should find that they "bore a similitude either in material, quality or tex-"ture, or use, to silk scarfs, the jury should find a ver-"dict for the defendant."

Properly refused. Neckties are enumerated in sections 22, Act March 2, 1861, and 13, Act July 14, 1862 (12 Statutes, 191, 556) as "articles worn by men, women and children," and again as "wearing apparel," which terms are repeated several times in the sections. These words are distinctly and explicitly descriptive of neckties as "articles worn," and as "wearing apparel." They embrace them as fairly and as fully as any form of words can. The words "jewelry," "embroideries," "hosiery," "ready-made clothing," "up-

per leather," "wearing apparel," distinctly describe all articles falling under those respective designations. Such forms of enumeration (*ex necessitate rei*) are frequent in tariffs, which cannot safely deal with particulars not only on account of the omissions that would inevitably occur, but because of the changes in the name and manufacture of articles which are constantly occurring, and which would be seized upon to evade the duty. Hence the use of the article is often made the test of its classification.

U. S. *v.* Washington Mills, 2 Clifford, 601 (see remarks on enumerations, page 605).

If the principle be granted that an article can be removed from such admitted descriptions as "jewelry" or "wearing apparel," because it bears "similitude either in material, texture or use," to another article which is not "jewelry" or "wearing apparel," you not only classify it under a description that the legislator has not employed, and nullify the *purpose* of the law that such articles are to pay duty according to *use*, but you render the whole enumeration "jewelry" or "wearing apparel" worthless, because there is no article falling under either term which may not bear similitude to some other article "either in material, quality, texture or use."

As the words in the Acts of 1861 and 1862, viz., "articles worn by men, women, and children," &c., * * and "wearing apparel," describe neckties, and as they are included in those terms, being articles worn on the person, they are *enumerated*, and the Act of August 30, 1842, sec. 20 (5 Statutes, 565), cannot apply, for it only refers to non-enumerated articles.

And in accordance with this view, the court charged the jury.

The distinction claimed between "an enumeration of articles," or articles described by names and classes, and the phrase "enumerated article" used in section

20 of the Act of 1842, is founded on no reasonable view of that statute. The subjects of duty are therein classed by name or special description in the first nine sections, and articles not named or classed (*i. e.*, non-enumerated) are provided for by section 10. Any article, or class of articles, named in previous sections could not fall under the non-enumerated section, because specifically provided for elsewhere; for if non-enumerated in *any sense* their previous mention would have been idle.

Among these "enumerations" in the Act of 1842 (5 Stats., 548-561), are the following, viz., "ready-made clothing of whatever materials composed, worn by men, women or children."

"All articles worn by men, women or children other than as above specified or excepted, of whatever materials composed, made up wholly or in part by hand."

"All manufactures of cotton or of which cotton shall be a component part.

"Any other manufacture not otherwise specified, suitable for the uses to which cotton bagging is applied."

"All other manufactures not otherwise specified, made of brass, iron, steel, or of which either of these metals is a component material."

None of these descriptions can fall under section 10 as not enumerated, because that section only covers by its language "articles *not enumerated or provided for*."

The 20th section of the Act of 1842 provides a rule of construction, which restricts the operation of the 10th or non-enumerated section to articles that do not bear similitude to articles previously classed for duty.

If the 20th section be allowed to operate on such terms as "articles worn by men, women and children" and "wearing apparel," as has been before observed, there will be nothing left for those phrases to act upon, for either in material, quality, texture or use there is some article, which every "article worn by men,

women and children" resembles in one of these particulars.

Take the words "manufactures of iron not otherwise specified." Under the construction claimed, if only one article of iron was enumerated, nothing could be classed for duty as a "manufacture of iron not otherwise specified," because every article of iron would, in material at least, "bear a similitude" to the one article of iron named.

Such a construction is at war with the plain provisions of the statute.

Nor do we see the justice of the distinction claimed between an "enumeration" and an "enumerated article." The argument for the government regards "scarfs" as an "enumerated article" and "articles worn by men, women or children" not an enumerated article or articles. But the difference is in degree only, for while wearing apparel includes all articles worn on the person, the word scarfs includes all kinds of scarfs (and they are many), by whatever name known. The word "scarfs" just as truly describes a *class* of articles as the words wearing apparel, the only difference being that one class includes more articles than the other.

We fail to see the force of the word "enumerated" in the 8th section of the Act of 1864, referred to by counsel. That word occurs as well in the sections of the Acts of 1861 and 1862 (12 Stats. 191, 556), relative to wearing apparel, and is the usual word employed in levying an impost. Whatever force it may have as a legislative recognition that the succeeding descriptions are "enumerated articles" applies equally as well to "articles worn," &c., as to "scarfs."

The insertion of the words "not otherwise provided for" in the Acts of 1861 and 1862, after the words "articles worn," &c., has no peculiar significance as claimed, for later, in the very same sections, we find the words "clothing ready made and *wearing apparel of every description* except wool," covering the same ground except as to woolens and without the qualifying words "not otherwise provided for."

Whether the legislators in enumerating, in the Act of 1864, suspenders, handkerchiefs, scarfs, hose, &c., were more advertent to the considerations that would have determined the duty on neckties than they were in passing the Acts of 1861 and 1862, where they used the terms "articles worn by men, women and children, of whatever material composed," &c., and "wearing apparel of every description," &c., may be doubted, because the sweeping words of "whatever material composed" and "wearing apparel of every description," are exhaustive, evincing an intent to include everything that can be worn on the person.

And when in later legislation apt words are *not* used to take out any given article of wearing apparel, it is *idle*, as well as *unsafe*, to speculate upon the supposed intent of Congress.

The claim of the Government is that although the jury have found that neckties are not scarfs, and although Congress has imposed on them a different rate of duty from scarfs, by apt words that include them, yet that they should be classed for duty as scarfs, under a rule of construction, because they, in some respects resemble scarfs. This is legislation under the guise of construction, and would repeal by interpretation (*pro tanto*) a plain provision of law.

The general exception to the charge of the court (Record, p. 11, fol. 36) is not operative under the rules.

Rule 4, Armstrong *v.* Toler, 11 Wheaton, 258, 277.

II.

The second error assigned is the instruction given to the jury, "that if you shall find on the evidence that the goods in question are not ready-made clothing and are not scarfs, the plaintiff is entitled to a verdict."

This ground of error does not appear to be noticed in the argument of the plaintiff in error, except to admit that, on the evidence, he is concluded from contending that neckties are articles of ready-made clothing (see page 8 of his brief). Why is he not, by parity of reasoning, concluded from contending that they are *scarfs?*

That it was a question for the jury to determine, what the articles in suit were, and that the verdict depended thereon, see

Lawrence *v.* Allen, 7 Howard, 785, 797, and cases cited.

GENERALLY.

What was the proper rate of duty upon neckties of silk in 1868?

Sections 22, Act of March 2, 1861, and 13, Act of July 14, 1862 (12 Statues, 191, 556), impose a duty of 35 per cent. on

"Articles worn by men, women or children, of what-"ever material composed—made up or made wholly or "in part by hand, not otherwise provided for." * * "Clothing ready made and wearing apparel of every "description, of whatever material composed, except "wool, made up or manufactured wholly or in part by "the tailor, seamstress or manufacturer."

Neckties of silk fall under these classifications. Has later legislation taken them out?

Later laws claimed to affect them are Act of June, 30, 1864, section 8, which reads:

"On silk vestings, pongies, shawls, scarfs, mantillas, "pelerines, handkerchiefs, veils, laces, shirts, drawers, "bonnets, hats, caps, turbans, chemisettes, hose, mits, "aprons, stockings, gloves, suspenders, watch-chains, "webbing, braids, fringes, galloons, tassels, cords and "trimmings, sixty per cent. *ad valorem.* * * On all "manufactures of silk, or of which silk is the com-

"ponent material of chief value, *not otherwise provided* "*for*, fifty per centum *ad valorem*."

Also the Act of March 3, 1865, section 3 (13 Statutes, 493), which reads, "on ready-made clothing of silk, or of which silk shall be a component material of chief value, sixty per centum *ad valorem*."

I.

Silk neckties are not "manufactures of silk, &c., not otherwise provided for," because they *are* provided for in the Acts of 1861 and 1862, as "articles worn by men, women or children," and as "wearing apparel."

Both terms include them, being used in their ordinary signification, and not as terms of trade. This question was settled in

Maillard *v.* Lawrence, 1 Blatchf., 504.
Affirmed, 16 How., 251.

II.

They are not ready-made clothing of silk under the Act of 1865. Congress did not intend to fully provide for silk goods in the Acts of 1864 and 1865. Silk twist and silk button cloths are still dutiable at 40 per cent. under the Act of August 5, 1861, section 2 (12 Statutes, 293), and manufactures of mixed materials in part of silk, cotton, flax, &c., still pay but 35 per cent. under sections 22, Act of March 2, 1861, and 13, Act of July 14, 1862 (12 Statutes, 192, 557); manufactures of silk—if embroidered, fall under the same sections, at the same rate of duty; manufactures of India rubber and silk are provided for in section 8, Act of July, 14, 1862 (12 Statutes, 552).

It would not seem, then, that Congress intended by the Acts of 1864 and 1865, to do more than the language of the acts would signify.

When Congress removed wearing apparel of *wool* from the Act of 1861, they used the most comprehensive language, *i. e.*, clothing ready made and wearing apparel of every description made of wool, &c. (14 Statutes, 561), to accomplish the purpose.

The term, wearing apparel, was first introduced into the tariff to cover articles not embraced under any commercial designation, and to supply the deficiencies of the term "ready-made clothing."

Maillard *v.* Lawrence, 1 Blatch., 504.
Same, 16 Howard, 251.

The court says in that case (16 Howard, 260): "It "must be understood as being the intention of the "Legislature to add to *clothing ready made*, in the ac- "ceptation above given, every article which in its de- "sign and completion, and received uses, is an article "of wearing apparel," &c.

If "wearing apparel" be the larger term, does the lesser term "ready-made clothing of silk" cover silk neckties?

In Elliot *v.* Swartout, 10 Peters, 137, an action to recover excess of duty paid on worsted and cotton suspenders where duty was levied under a clause imposing fifty per cent. *ad valorem* on manufactures of wool and ready-made clothing, the court ignored the words "ready-made clothing," turning the case on the distinction between wool and worsted.

In Hall *v.* Hoyt, reported in 2d Hunt's Merchants' Magazine, 334, an action to recover an excess of duty paid on knit shirts and drawers, the court charged the jury that "if the goods were hosiery in commerce, they were not ready-made clothing."

In Dorr *v.* Hoyt, 2 Hunt's Merchants' Mag., 262, held (counsel consenting), that worsted cravats were not ready-made clothing, but hosiery.

A cravat and necktie are as nearly alike as two different articles can be, and both are "wearing apparel" and an "article worn," &c.

The decisions all appear to be that the term "ready-made clothing" is a trade term, and will not cover hats, caps, stockings, hosiery, articles of underwear, ties, cravats, &c., all of which are "wearing apparel" and "articles worn by men, women or children."

Therefore the court very properly instructed the jury that if ties were not "ready-made clothing" and not scarfs, to find for plaintiff. And their verdict is conclusive on this question.

III.

Neckties of silk are not scarfs, and by their verdict the jury so found.

They are not liable to duty as scarfs, from similitude under section 20, Act of Aug. 30, 1842 (5 Statutes 565), because ties *are enumerated* in the term "*wearing apparel*" and "articles worn by men, women and children."

A non-enumerated article is one not embraced under a description contained in an enumeration of articles (U. S. *v.* U. S. Telegraph Co., 2 Benedict, 362; also reported in 7 Int. Rev. Record, 141, and cases there cited).

The case of Cohen *v.* Phelps, 19 Int. Rev. Record, 67, which admits the principle in the above cases, practically conflicts with them, because it overlooks the non-enumerated section of the present tariff (sec. 24, Act. March 2, 1861, 12 Statutes, 196).

It treats the words "manufactures of iron not otherwise provided for" in the Act of 1864, as a non-enumerated clause, whereas it is a *residuary* clause embracing all manufactures of *iron* not before named

for duty. Its design is to prevent any manufacture of iron from falling into the non-enumerated clause of the Act of 1861. A definition by *exclusion* is as positive as a definition by *inclusion*.

To illustrate: Had the law read "All manufactures of cast-iron 25 per cent., and then all manufactures of iron not otherwise provided for, 30 per cent.," certainly no article not of cast-iron would fall under the first clause by similitude, if made of iron, because it in terms falls exactly within the second clause.

This is the state of the law in Cohen *vs.* Phelps. But if the law were that all manufactures of cast-iron should pay 30 per cent., and manufactures of wrought-iron 40 per cent., without any residuary clause, then the duty on a non-enumerated iron, like sheet-iron, must be ascertained by similitude, because sheet-iron is not covered by any form of words.

In Stuart *vs.* Maxwell, 16 Howard, 158, on which Cohen *vs.* Phelps claims to be based, the "enumerated article" with which manufactures of linen and cotton which were not provided for by law were classed for duty, was "manufactures wholly composed of cotton not otherwise provided for."

As, by the text of the Act of 1842, the non-enumerated article must bear similitude to an "enumerated article," the court, in Stuart *vs.* Maxwell, must have held that "manufactures wholly composed of cotton not otherwise provided for" was an enumerated article, and as this is just the same kind of term as "manufactures of iron not otherwise provided for" in the Act of 1864, the latter is an enumeration also, and the decision in Cohen *vs.* Phelps was wrong.

The case of Cohen *vs.* Phelps stands alone, while the conclusions reached by Judge Blatchford in the United States *vs.* United States Telegraph Co., and by the court below in this case, have uniformly been followed, and are admitted even by the decision in Cohen *vs.* Phelps to present the true state of the law, the learned judge therein attempting to distinguish between those cases and his own.

The true rule is well stated by Judge Nelson in Lattimer *vs.* Lawrence, 1 Blatchford, 614, as follows: "The goods then coming within the list of articles "enumerated in that schedule, the case is not one that "can be aided by the 20th section of the Act of 1842; "because that section applies only in cases where the "article in question has not been otherwise provided "for. If it has been specially provided for, that ex- "cludes any constructive designation by operation of "the 20th section."

It is to be observed also that it never occurred to court or counsel, in Maillard *vs.* Lawrence, 16 Howard, 251, that the words "wearing apparel" or "articles worn," &c., were not an enumeration, although the similitude section was then in force.

As, then, neckties are neither scarfs nor ready-made clothing, as found by the jury, and *are provided* for under the enumeration of "articles worn," &c., and "wearing apparel" in the Acts of 1861 and 1862, the judgment below should be affirmed.

EDWARD HARTLEY,
Counsel for Defts. in Error.